Peabody Coal Company *and* International Union, United Mine Workers of America. Case 14-CA-14724

February 4, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On September 25, 1981, Administrative Law Judge John C. Miller issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Peabody Coal Company, Stonefort, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1(e):

"(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their Section 7 rights."

2. Substitute "Stonefort, Illinois," for "St. Louis, Missouri," in paragraph 2(b).

3. Substitute the attached notice for that of the Administrative Law Judge.

IT IS FURTHER ORDERED that the complaint allegations not specifically found herein be, and they hereby are, dismissed.

[1] The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

In sec. II,A,6, the Administrative Law Judge attributed to employee witness Danny Gibbs the testimony about a threat by Supervisor Ronald Menzie. The record shows that employee Phyllis Adler, not Gibbs, testified about the threat. This inadvertent error does not alter our finding of a violation.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To engage in activities together for the purpose of collective bargaining or other mutual aid or protection
To refrain from the exercise of any or all such activities.

Accordingly, we give you these assurances:

WE WILL NOT threaten employees with loss of seniority and/or loss of employment if the Union were selected as their bargaining representative, nor interrogate employees about their union sympathies, about their signing of union cards, or as to how they voted in a Board election.

WE WILL NOT solicit employees to withdraw their support for the Union, nor offer the use of our typewriters in preparing letters requesting that negotiations cease.

WE WILL NOT promise employees more favorable consideration on company jobs if they wrote letters stating that they no longer wished to be represented or if they requested that negotiations cease, nor tell employees that we would only give employees what we wanted in negotiations thereby implying that negotiations would be futile.

WE WILL NOT refuse to bargain in good faith with International Union, United Mine Workers of America as the duly certified collective-bargaining representative of the warehouse employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their Section 7 rights.

WE WILL, upon request, bargain with International Union, United Mine Workers of

America as the duly designated representative of the employees in the appropriate unit.

PEABODY COAL COMAPNY

DECISION

STATEMENT OF THE CASE

JOHN C. MILLER, Administrative Law Judge: This case was heard before me in St. Louis, Missouri, on May 13, 1981. The complaint alleged various violations of Section 8(a)(1) of the Act both before and after a representation election which was held on January 9, 1981. The complaint also alleged that Respondent violated Section 8(a)(5) of the Act in refusing to bargain with a certified union. Although the Union has requested bargaining, Respondent continues to refuse on technical grounds although its request to the Board for review of the Union's certification was denied. (Resp. Exh 2.)

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent Peabody Coal Company is a corporation duly authorized to do business under the laws of the States of Missouri and Illinois. Respondent has maintained its principal office and place of business in St. Louis, Missouri, and also maintains other facilities in numerous States, including the mine facility located at Rural Route 1 in the city of Stonefort in the State of Illinois, hereafter referred to as the Will Scarlet Mine. The Will Scarlet Mine is the only facility involved in this proceeding. It is alleged and admitted that during the year ending December 31, 1980, Respondent, in the course and conduct of its business operations, mined at its Will Scarlet surface mine located at Stonefort, Illinois, coal valued in excess of $50,000 of which coal valued in excess of $50,000 was shipped from said facility directly to points located outside the State of Illinois.

On the basis of the above admitted facts, I find that Respondent is now, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

It is further alleged and admitted that the Charging Party, International Union, United Mine Workers of America is a labor organization within the meaning of Section 2(5) of the Act and I so find.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The 8(a)(1) Allegations*

The numerous 8(a)(1) allegations are treated in chronological order and in the order in which they appear in the amended complaint.

1. It is alleged that Respondent's mine superintendent, Menzie, on or about December 12, 1980, urged an employee to vote against the Union by promising that wages and benefits would increase without the employees' selecting union representation. There is no testimonial support for this allegation even in the employee's account of his December 12 conversation with Menzie. According to Gibbs, an employee, Menzie said, "I'd like to give you my personal opinion about the election coming up. It looks like you would be better off to go ahead and vote the Union down at this time then wait and see what the outcome of Consolidated Coal Company would be." By this, Menzie was referring to a company where a union had recently won the election and where a contract had not yet been negotiated. Menzie cannot conceivably be seen as promising anything in this remark. Therefore, I recommend that this allegation be dismissed.

2. The complaint further alleges that Superintendent Menzie, on or about December 12, 1980, threatened an employee with loss of employment should the employee select the Union as his collective-bargaining representative. Danny Gibbs credibly testified that, in his December 12 conversation with Menzie, Menzie said "there's a possibility that Pit 16 might shut down and those men over there could bump you if you get in the Union because you have no seniority." Thus, if there were layoffs or reduction in force, others would have more seniority because, as a new member of the Union, Gibbs would have little or no seniority. As a result, Gibbs would be placed on a layoff panel and, due to the number on that list, his chances for employment were minimal. Menzie testified that in discussing seniority with employees, he pointed out to them that their seniority depended on what was negotiated by the Union and the Company. He strongly suggested that their seniority date would be their first day of union membership and that hence they would not get credit for any years of prior employment. Menzie's statement was an implicit threat to the employee that he would lose his job should the Union be selected since his remarks linked, in the guise of a prediction, a union victory and loss of employment. See *Hinky Dinky Super Markets, Inc.*, 247 NLRB 1176, 1178 (1980). I credit Gibbs' version and do not credit Menzie in this respect. Accordingly, I find that this threat was violative of Section 8(a)(1) of the Act.

3. It is further alleged that, on December 21, 1980, Mine Superintendent Menzie interrogated employee Richardson concerning his signing of a union card and his support for the Union and also threatened Richardson with loss of seniority and loss of employment if the Union won. Menzie admits having asked Richardson if he had signed a union card. He also admits having told Richardson that, if the Union won, negotiations about seniority would result in his placement at or near the bottom of the seniority list and, in a work force reduction, he would be laid off. Menzie subsequently claimed to have merely suggested that a union victory could lead to a layoff, but I credit his earlier account and the account of employee Richardson, who also testified that Menzie asked him, in that same conversation, why he favored the Union. Accordingly, I find several 8(a)(1) violations in Menzie's December 21 conversation with Richardson. See *Central Freight Lines, Inc.*, 255 NLRB 509 (1981).

4. The complaint alleged that on or about January 7, 1981, Menzie threatened an employee with loss of employment should the employee select the Union as her bargaining representative. Lori Wahls, a warehouse clerk and employee of Peabody, testified that on or about January 7, 1981, she had a conversation with Menzie in the warehouse. She testified that Menzie told her that if the Union won the election there would be a layoff and that she probably would never work for Peabody again. Menzie's version was different in that he had simply advised employees that if the Union won the election, when the employees became union members, depending on how their seniority was negotiated, they would probably be at the bottom of the seniority list and that, in any reduction in force, they would be the first laid off. Wahls appeared sincere and credible and I credit her version. Accordingly, I find that the comments attributed to Menzie in January constituted a threat to Lori Wahls that she would be laid off if the Union won the election. I find such a threat to be violative of Section 8(a)(1) of the Act.

5. It is alleged that on January 9, 1981, the date of the election, Mine Superintendent Menzie interrogated an employee as to how the employee voted in the election. Menzie himself admits asking employee Emmons whether he voted for "me" or "them." Accordingly, I find that this interrogation constitutes a violation of Section 8(a)(1) of the Act.

6. It is alleged that on January 23, 1981, Menzie threatened an employee with loss of employment. Except for the date, the allegation appeared the same as previously discussed in paragraph 4, *supra*. Preliminarily, I note that, since the allegation was a threat of loss of employment should the employees select the Union and since the union election was held on January 9, it appears that the allegation is at best misworded.

Concerning this allegation, Alder testified that on or about that date Menzie approached her at the warehouse window where she was working and stated he was "surprised in us people wanting to go union, that he had been good to us." According to Gibbs, Menzie also said that he would lay "all of us" off eliminating some of the paperwork or having it done by people from the mines. Alder's testimony does not establish any threat. I credit Gibbs that Menzie said he could lay "all of us" off and use people from the mines. Despite a slight variance from the allegation, I find Menzie's comment to Gibbs, even though it occurred after the election, constituted a threat violative of Section 8(a)(1) of the Act.

7. It is further alleged that on or about February 15, 1981, Menzie threatened employees with loss of seniority because they had selected a union; that Menzie threatened employees with loss of employment because the employees had selected the Union; and that Respondent had created the impression of surveillance of employees' union activities by identifying which employees Respondent believed had voted for and against the Union; and, lastly, that Respondent stated that an employee, believed to have voted against the Union, would be transferred to preserve that employee's job in the event of layoffs.

Danny Gibbs testified that on or about February 15, 1981, Menzie said to him: "You've lost your jobs to the union now." According to Gibbs, Menzie further said, "In the next week or so I'm going to be hiring 11 more men and 3 more the following week for union jobs and that will put you further down the line in your seniority." Menzie further stated that he thought six employees would vote against the Union. When questioned about his conversation, Menzie remembered discussing the hiring of new employees with Gibbs, and telling Gibbs about a 30-day period during which employees could get out of the Union. Menzie further stated that, in regard to seniority, there was no seniority list with respect to the warehouse unit and that the Union has seniority over these jobs. I credit Gibbs' testimony and find that it supports the allegation of a threat of loss of seniority and employment because of selection of the Union. However, I find no evidence to support the latter two allegations involving surveillance and transfer of an employee. Menzie's statement that he thought six employees would vote against the Union does not in my view establish that there was an impression of surveillance. There had been six votes in favor of the Union and one vote against the Union. Since Menzie presumably knew employees' views fairly well, it is not surprising that he would have a view as to how the employees voted and his articulation of that view, without more, does not give the impression of surveillance. Further, I find no testimonial support for the allegation that on or about February 15 Respondent stated through Menzie that an employee would be transferred in order to preserve his job in the event of layoffs. Therefore, as to the specific allegations around February 15, 1981, I find that Menzie did threaten Gibbs with loss of seniority and loss of employment because employees selected the Union as their bargaining representative in violation of Section 8(a)(1) of the Act. With respect to remaining allegations, I find no evidentiary support and recommend their dismissal.

8. The complaint alleges that on or about February 23, 1981, Menzie did the following: solicited employees to withdraw their support for the Union by encouraging them to prepare notarized letters requesting that negotiations cease; offered to allow employees to use Respondent's typewriters to prepare such notarized letters; promised that Respondent would give more favorable consideration in awarding jobs to those employees who signed the letter requesting negotiations cease as compared to employees supporting the Union; and implied that union representation was futile by stating that Respondent would only give the employees what Respondent wished.

Phyllis Adler testified, in regard to the first two allegations, that Menzie had told her, as well as Gibbs, that the Union did not really want the warehouse employees as members, but that actually the Union wanted the warehouse jobs to be union jobs. Menzie further told Adler and Gibbs that they could prepare an affidavit, saying they did not want to join the Union, on the supply room typewriter. Adler credibly testified that she had never asked Menzie or anyone else about how to get out of the Union. Gibbs testified, regarding the same

conversation with Menzie, that Menzie had called him and Adler into Menzie's office and had told them that some employees had asked him how to get out of the Union. Menzie told Adler and Gibbs that they could write a letter, using a company typewriter, stating that negotiations should cease. They would have to get five people to sign this letter and they would have to get it notarized. Menzie also told them that they would have to do all those things on their own. Gibbs credibly testified that he had never asked Menzie how to get out of the Union. I credit his testimony in this regard over Menzie's testimony that Gibbs had asked him how to get out of the Union. I credit Gibbs' and Adler's testimony in regard to the conversation with Menzie although Adler remembered the date of the conversation as February 27, whereas Gibbs remembered it as February 23. I do not credit Menzie's testimonv that Gibbs asked on his own initiative if he could use the company typewriter to type the affidavit requesting that negotiations cease.

Accordingly, I find that Menzie's conversation with Gibbs and Adler violated Section 8(a)(1) of the Act in that Menzie solicited Gibbs and Adler to withdraw their support of the Union and offered a company typewriter to type an affidavit to that effect.

As to the third and fourth allegations above, Gibbs testified that Menzie had also said during that above conversation that if five people did not sign a letter to stop negotiations with the Union, it would be impossible to get a company (nonbargaining unit) job. According to Gibbs, Menzie then went on to identify George Brouillete (the employee previously identified by Menzie as having cast the one "no" vote for the Union) as the only person who, at that time, could get a company job if he asked for one. Menzie then said that, after five people signed a letter requesting that negotiations cease, so-called company jobs would become available to them. Finally, Gibbs remembered Menzie saying that Peabody was not negotiating at that time but when it did start negotiating it would not give the employees what they wanted, that instead the employees would have to take what Peabody gave them.

I find that Respondent promised favorable consideration for jobs for those who signed a letter requesting that negotiations cease and thereby violated Section 8(a)(1) of the Act. It is not clear whether the comment on bargaining indicated simply his opinion that the Company would take a hard bargaining stance or was, alternatively, implying that negotiations would be futile.

In view of the context in which this occurred, especially his urging employees to disavow the Union, I find the bargaining comment violative of Section 8(a)(1).

9. It is alleged that sometime during the latter part of February 1981 Mine Superintendent Menzie solicited employees to withdraw support for the Union by encouraging the employees to prepare letters informing the Union they no longer wished it to be their collective-bargaining representative. Pertinent to this allegation, employee Richardson testified that Menzie told him and his fellow employees Robinson and Brouillete that Menzie had been approached by three employees who wanted to know how they could get out of the Union. Menzie told Richardson and the others that they could either write a letter individually or they could write a letter collectively saying that they no longer wanted the Union to represent them. Richardson credibly testified that he had never asked Menzie or anyone else how to get out of the Union. Menzie's testimony did not contradict Richardson in regard to this conversation in any significant respect. Therefore, I find Menzie's conduct in soliciting employees Richardson, Robinson, and Brouillete to write a letter saying they no longer wished to be represented by the United Mine Workers to be a violation of Section 8(a)(1) of the Act.

10. It is alleged that sometime during the latter part of February 1981 Mine Superintendent Menzie solicited an employee to withdraw support for the Union by encouraging the employee to prepare and sign a letter informing the Union that he desired to withdraw from the Union.

Regarding this allegation, employee Don Emmons credibly testified that, in late February 1981, Menzie told him that if he wanted to get out of the Union he could write and sign a letter which said he no longer wanted to be in the Union. Although Menzie testified that he gave Emmons this information because Emmons had previously asked him how to get out of the Union, Emmons credibly denied that he had ever asked Menzie about getting out of the Union. Therefore, I find that in this instance, the information Menzie proffered was tantamount to a solicitation that the employee write and sign a letter saying that the employee wished to withdraw from the Union. Accordingly, I find this conduct to be a violation of Section 8(a)(1) of the Act.

11. It is further alleged that on or about March 2, 1981, Menzie solicited an employee to withdraw support from the Union by encouraging the employee to prepare a notarized letter requesting the Union to cease negotiations. It is also alleged that he offered to allow the employee to use Respondent's typewriter to prepare such a notarized letter. Regarding these allegations, Lori Wahls testified that on March 2, while she was working in the warehouse clerk's office, Menzie approached her and mentioned that three or four employees had asked him about getting out of the Union and he advised her that she could type an affidavit to that effect. Menzie pointed in the direction of the warehouse typewriter and told Wahls that she could use it to type the affidavit. Wahls further credibly testified that she had never asked Menzie for any procedure about getting out of the Union. In this respect, Menzie did testify that only two persons, Danny Gibbs and Don Emmons, had asked him about getting out of the Union. Menzie admitted that none of the other employees had solicited his advice about getting out of the Union. Danny Gibbs specifically denied that he had ever inquired about the manner of getting out of the Union. I credit Gibbs in this respect. Even assuming that one or more employees did ask Menzie what they should do in order to get out of the Union, I find that he gratuitously volunteered information to others concerning a procedure for getting out of the Union. I credit Wahls' testimony about the March 2 conversation and find that by soliciting her to execute an affidavit withdrawing support from the Union and by of-

fering her the use of a company typewriter, that Respondent in both respects violated Section 8(a)(1) of the Act.

B. *The 8(a)(5) Allegations*

It is undisputed that on January 9, 1981, a majority of the employees in the warehouse unit selected the United Mine Workers as their collective- bargaining representative and that on January 19 the Regional Director certified the United Mine Workers as the exclusive collective-bargaining representative of the employees in said unit. It is undisputed that on or about January 29, 1981, the Charging Party by mailgram requested Respondent to recognize and bargain with it as the exclusive representative of Respondent's employees, namely, the warehouse clerk's unit. (See G.C. Exh. 7.) It is further undisputed that by letter on or about February 6, 1981, Respondent denied the request for recognition and bargaining. (See G.C. Exh. 8.) Thus, with respect to the 8(a)(5) allegations, it is admitted that Respondent has refused the certified Union's request for recognition and bargaining. Respondent's counsel alleged that the existing National Bituminous Coal Agreement, introduced here as Respondent's Exhibit 2, is a bar to negotiations and/or certification of the warehouse clerk's unit. Respondent's counsel conceded that he wished to appeal the Board's decision denying review in the representation case and that, therefore, a refusal to bargain was necessary in order to test the appropriateness of the certification, under these circumstances.

In view of the Board's denial of review by mailgram (introduced here as G.C. Exh. 5), I have no alternative but to hold that the certification is appropriate, and that Respondent's refusal to bargain is unwarranted. Accordingly, I find that Respondent's refusal to recognize and bargain with the certified Union is a refusal to bargain within the meaning of Section 8(a)(5) of the Act.

CONCLUSIONS OF LAW

1. The Respondent, Peabody Coal Company, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Charging Party, International Union, United Mine Workers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent, through its Mine Superintendent Ron Menzie, violated Section 8(a)(1) of the Act by: threatening employees, on or about December 12, 1980, and January 7, 1981, with loss of seniority and employment should they select the Union as their collective-bargaining representative; interrogating an employee regarding his signing of a union card and his union support; threatening an employee with loss of seniority and loss of employment if the Union won; interrogating an employee as to how the employee voted in the election; threatening an employee, on February 15, 1981, with loss of seniority and loss of employment because employees selected the Union as their bargaining representative; soliciting employees to withdraw their support for the Union by encouraging them to prepare notarized letters requesting that negotiations cease; offering to allow employees to use Respondent's typewriters to prepare such notarized letters; promising that Respondent would give more favorable consideration, in awarding jobs, to employees who signed the letter requesting that negotiations cease; implying that union representation was futile by stating that Respondent would only give the employees what Respondent wished; soliciting employees to write a letter saying they no longer wished to be represented by the United Mine Workers; soliciting an employee to withdraw support for the United Mine Workers by encouraging the employee to prepare and sign a letter informing the Union that the employee desired to withdraw from the Union. The above enumerated conduct on December 12, 1980, January 7, February 15 and 23, and March 2, 1981, all constitute separate violations of Section 8(a)(1) of the Act.

4. Respondent's refusal on or about February 6, 1981, to recognize or bargain with the duly certified Union, herein the United Mine Workers, constitutes a refusal to bargain and is a violation of Section 8(a)(5) of the Act.

5. The above enumerated unfair labor practices affect commerce within the meaning of the Act. Except for the unfair labor practices found herein, the remainder of the unfair labor practice allegations are dismissed.

THE REMEDY

The recommended Order will require Respondent to cease and desist from the unfair labor practices found. Respondent shall also be required to bargain with the United Mine Workers for 1 full year from the date bargaining between the two parties initially begins.

ORDER[1]

The Respondent, Peabody Coal Company, Stonefort, Illinois, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening employees with loss of seniority and/or loss of employment if the Union were selected as bargaining representative; interrogating employees about their union sympathies, or their signing of union cards, or as to how they voted in a Board election.

(b) Soliciting employees to withdraw their support for the Union and offering the use of Respondent's typewriters in preparing letters requesting negotiations cease.

(c) Promising employees more favorable consideration on company jobs if employees wrote letters stating they no longer wished to be represented or if they requested negotiations cease; telling employees that Respondent would only give employees what Respondent wanted in negotiations, thereby implying negotiations would be futile.

(d) Refusing to bargain in good faith with the United Mine Workers, the duly certified collective-bargaining representative of the warehouse employees.

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[1] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their Section 7 rights.

2. Take the following affirmative action in order to effectuate the purposes of the Act:

(a) Bargain in good faith with United Mine Workers, the duly certified bargaining representative of Respondent's warehouse employees.

(b) Post at Respondent's facility at St. Louis, Missouri, copies of the attached notice marked "Appendix."[2] Copies of said notice, on forms provided by the Regional Director for Region 14, after being duly signed by Respondent's representative, shall be posted by it immediately upon receipt thereof, and be maintained by Respondent for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 14, in writing, within 20 days from the date of of this Order, what steps Respondent has taken to comply herewith.

[2] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."